INDEX OF AUTHORITIES CITED

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In the Supreme Court
of the United States

OCTOBER TERM, 1946

No.....

NANNY WOOD HONEYMAN, Executrix of the Estate of DAVID T. HONEYMAN, Deceased, (substituted for DAVID T. HONEYMAN) and NAN WOOD HONEYMAN,
Petitioners,

-vs-

MATT S. HUGHES, Trustee in Bankruptcy of Honeyman Hardware Company, a corporation, bankrupt,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO: The Honorable the Supreme Court of the United States:

THE MATTERS INVOLVED

The Honeyman Hardware *Company* was adjudicated bankrupt by the District Court of the United States for the District of Oregon in May, 1942. David Honeyman, one of the petitioners here held, since 1928, legal title to, and claimed ownership in, certain real estate on which

he shortly thereafter erected a building and leased the same to the General Electric Company. The money with which to erect the building was obtained by negotiating a loan on the property upon his and his wife's note. The property ever since has been occupied, under the lease or an extension thereof, by that company. In 1933 an agreement was made between David Honeyman and his two brothers that if there should be paid to David Honeyman $25,000.00 plus the liquidation of the mortgage indebtedness, he and his wife would convey the property to Honeyman Hardware Company. Later in 1933 it is claimed by David that it was agreed between him and his brothers, the parties to the earlier agreement, that David should have the property absolutely. Honeyman Hardware Company, the bankrupt, never held the legal title to the property, nor was it a party to the lease to General Electric Company.

In June, 1943, in the bankruptcy proceedings of Honeyman Hardware Company, and fifteen years after the acquisition of the property by David, the bankruptcy court by summary order directed David to assign the lease and rentals to the bankruptcy trustee, respondent here, notwithstanding it was without jurisdiction so to do. However, no review of the order was taken by David Honeyman, and it became final. In September of the same year an order was entered, in a suit brought in the United States District Court by the General Electric Company against the Trustee in bankruptcy, the mortgagee, and David Honeyman, directing the General Electric Company, lessee, to pay all rentals to the trustee.

In February, 1944, the trustee filed with the referee a petition alleging ownership of the property in the bankrupt and praying that David Honeyman and his wife be ordered to deed the property to him as Trustee for the bankrupt estate. David Honeyman and his wife answered specially and denied jurisdiction of the court, claiming that for the Court to make such an order "would be taking of property without due process of law." They failed however to deny an allegation in the Trustee's petition that the Trustee had possession of the property—such allegation being in the nature of a legal conclusion. Upon hearing, the Referee ordered the petitioners here, David Honeyman and his wife, to turn over the fee in the property to the Trustee. On application for review the judge affirmed the order, and on appeal the order was again affirmed.

BASIS OF JURISDICTION OF THIS COURT TO REVIEW JUDGMENT

Section 24 (c) of the Bankruptcy Act of 1898 as amended (11 U.S.C.A. 47(c)) provides:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees and orders of the Circuit Courts of Appeals of the United States . . . . . in proceedings under this Act in accordance with the provisions of the laws of the United States now in force, or such as may hereafter be enacted."

Section 204 (a) of the Judicial Code (28 U.S.C.A. 347 (a)) provides:

"In any case, civil or criminal, in a Circuit Court of Appeals . . . . it shall be competent for the Supreme Court of the United States, upon petition of any party thereto . . . . to require by certiorari, either before or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it, with the same power and authority and with like effect, as if the cause had been brought there by unrestricted appeal."

THE QUESTIONS PRESENTED

The questions presented on this petition are:

1. In a Summary proceeding, did the failure of the adverse claimants to deny an allegation of possession, dubious in nature, in the Trustee's petition for a turnover order, give the bankruptcy court jurisdiction, where in fact the Trustee was not in possession?

2. Is consent to jurisdiction given where objection is made, and lack of jurisdiction is asserted by the adverse claimants, even though the specific grounds for its absence be not definitely and meticulously spelled out by the adverse claimants?

3. Is consent to jurisdiction by the adverse claimants given, in spite of their denial of jurisdiction and their protest at the assumption by the Referee of the right to hear the cause?

4. Is such a failure to deny an allegation of possession tantamount to consent to jurisdiction, notwithstanding that jurisdiction is specifically contested by the adverse claimants in their special answer?

REASON FOR ALLOWING WRIT

(1) It is urged that the Circuit Court of Appeals decided the question of federal bankruptcy jurisdiction in conflict with the following applicable decisions of this court.

Louisville Trust Co. v. Comingor, 184 U.S. 18, 22 Sup. Ct. 293, 296, 46 L. Ed. 413.

Cline v. Kaplan, 323 U.S. 97; 89 L. Ed. 97, 99; 65 Sup. Ct. 155.

(2) It is further urged that the trial court and the appellate court in their determination of the question of jurisdiction have so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

Respectfully submitted,

ELTON WATKINS,

W. G. KELLER,

SIDNEY TEISER,

The undersigned of Counsel for Petitioners certify that the foregoing petition for a writ of certiorari is well founded in law and is not interposed for delay.

SIDNEY TEISER,

In the Supreme Court of the United States

OCTOBER TERM, 1946

No.....

NANNY WOOD HONEYMAN, Executrix of the Estate of DAVID T. HONEYMAN, Deceased, (substituted for DAVID T. HONEYMAN) and NAN WOOD HONEYMAN,

Petitioners,

-vs-

MATT S. HUGHES, Trustee in Bankruptcy of Honeyman Hardware Company, a corporation, bankrupt,

Respondent.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Circuit Court of Appeals was rendered and filed on May 22, 1946. It has not yet been officially reported, but it appears in the Transcript at pages 518-521. No opinion of the trial court was rendered. The opinion of the Referee appears in the Transcript at pages 37-41.

JURISDICTION

The statutes upon which jurisdiction of this Court is invoked have been set forth in the petition for Writ of Certiorari and will not be repeated here. (See Petition page 3).

STATEMENT OF THE CASE

The Honeyman Hardware Company was adjudicated bankrupt on May 5, 1942. At that time, and for fourteen years previous, David Honeyman, petitioner here, was the holder of the title to a parcel of land in Portland, Oregon, here in controversy, known as the Vaughn Street property. He had acquired the fee by *general warranty deed* from Honeyman *Investment* Company (not the bankrupt) on February 15, 1928. ("Ex. PP," R. 369; R. 213; "Ex. W," R. 216) The bankrupt never held the title to this property. David Honeyman, upon obtaining title to the property, erected thereon a building with money which he, himself, and his wife supplied, in part through a loan secured by mortgage upon the property. To repay the loan, he and his wife executed their personal note. He straightway rented the property to the General Electric Company under a lease in which he was the lessor and the General Electric Company the lessee. The General Electric Company still holds under this lease, or rather under an extension of it. ("Ex. Q," R. 159).

After the acquisition of the title to the Vaughn Street property by David Honeyman in 1928, all agreements or memorandums of agreement concerning this property were those between the three Honeyman brothers, David, Thomas and James individually, the final agreement being evidenced by a letter dated October 9, 1933, ("Ex. EE," R. 242-245) written by Thomas to James, a copy of which was delivered to David, which stated:

"In conversation with Dave, he feels that now that we have divided up the property of the Honeyman *Investment* Company and I have taken over Broadway and Washington and you have the 9th and Glisan and Dave has taken over 19th and Vaughn Street (the latter being the property in litigation) that he is getting the worst of it.."[1]

The agreement between the three brothers evidenced by this letter supplanted an agreement between the same brothers executed a few months earlier—on April 20, 1933 ("Ex. A," R. 112-115; "Ex. QQ," R. 365). (The Trustee claims that this agreement was not supplanted and that it is still in effect.) Under the agreement of April 20, 1933, David Honeyman and wife agreed to transfer to the Honeyman Hardware Company the property in question upon their being paid the sum of $25,000.00, plus the unpaid balance of the mortgage upon the property securing notes given by David and his wife to the Oregon Life Insurance Company. (David insists that the $25,000.00 has not been paid and that the mortgage indebtedness to the Oregon Life Insurance Company has not been discharged. The Trustee maintains that the $25,000.00 has been paid, but there is no claim that the mortgage indebtedness has been paid—there is merely a statement of the Trustee's ability and willingness so to do.)

Some time after bankruptcy, the Trustee filed a petition in the bankruptcy proceedings praying for the issu-

(1) This letter, upon the objection of the Trustee, was not received in evidence by the Referee, although testimony was given that it was acted upon and acquiesced in by the three brothers. (R. 245) Why the introduction was not proper is not understandable since the exhibit was a signed writing. We maintain that the letter was admissible and must be considered as a part of the evidence in this cause.

ance by the referee of an order to show cause against David and his wife requiring them to turn over and assign all their interest in the lease, including rentals to be received from the General Electric Co. Such an order was issued, though the court certainly had no jurisdiction so to do, and thereon an order was made directing that David assign to the Trustee all his interest in the lease and in the rentals. Unwisely, David did not ask a review of this order, but he refused to obey it. Whereupon he was cited for contempt, and, upon imminent peril of imprisonment and while in the custody of the Marshal, he executed such assignment under protest.

The lessee, General Electric Company, then instituted suit in the Federal District Court against the Trustee, against David Honeyman and his wife and against the Oregon Life Insurance Company to ascertain its rights and obligations, and in such suit a decree was entered directing it to pay to the Trustee all rentals accruing under the lease entered into between it and David Honeyman. (R. 44).

Thereupon, the Trustee, who had instituted a plenary suit in the State Court to divest David and his wife of the fee in the Vaughn Street property and to compel a conveyance of such fee to him, filed a further proceeding by petition in the bankruptcy court praying for an order to show cause against David and his wife why they should not convey said fee to him. In his petition the Trustee equivocably asserted possession of said property by virtue of the prior order of the Bankruptcy Court, and the enforced obediance thereof by David. (R. 10-18).

The Referee directed such conveyance, and upon review the District Court affirmed the Referee's order.

On appeal, the Circuit Court of Appeals for the Ninth Circuit held that the order was properly issued, and that the Court was given jurisdiction because the adverse claimants failed to deny the paragraph in the Trustee's petition which alleged, inferentially and equivocally, the Trustee's possession of the premises. Further, the appellate court held that the claimants' denial in their special answer of the court's jurisdiction and their protest at the court's assumption of jurisdiction, was ineffectual since there was a failure to specify the grounds on which the objection to jurisdiction by the claimants was based. (The claimants had filed a special answer where it was merely alleged that:

> "Said proposed order if carried into execution would be taking of property without due process of law, and finally the Court is without jurisdiction in the premises." (R. 35))

SPECIFICATION OF ERROR

The appellate court erred in failing to reverse the order of the District Court affirming the Referee in that:

I.

It erroneously held that the failure of the adverse claimants to deny an allegation of the Trustee's petition affirming possession was tantamount to an admission of possession in the trustee, which thereby gave the court jurisdiction; and this notwithstanding that the allegation affirming possession was a conclusion of law

and an equivocal statement, and notwithstanding too that the petition showed the Trustee was not in fact in possession.

II.

It erroneously held that the bankruptcy court could properly hear a matter summarily and yet it approved the requirement that claimants should strictly adhere to the rules of pleading prescribed for plenary matters and particularly to Rule 8 (d), Rules of Civil Procedure for District Courts of the United States.

III.

It erroneously failed to consider that the adverse claimants' special appearance and their answer objecting that "said proposed order would be the taking of property without due process of law", was an objection to the summary jurisdiction of the Referee, and that their objection that "the court is without jurisdiction" was an objection to the plenary as well as summary jurisdiction of the District Court, and that both of said objections was a negation of their consent.

IV.

It erroneously held that the adverse claimants' objection to jurisdiction of the Federal Court that a suit by the Trustee was pending for the same relief in the State Court was not in effect a negation of consent to jurisdiction of the Federal Court.

V.

It erroneously held in effect that the adverse claimants were required, in order not to be charged with consent to jurisdiction, to specify the particular grounds

or reasons why the objection to jurisdiction was taken.

VI.

It erroneously held that the adverse claimants' mere failure to deny an allegation in the Trustee's petition which asserted, inferentially and equivocally, possession by the Trustee was tantamount to consent to the assumption of jurisdiction by the bankruptcy court, notwithstanding that the Trustee did not in fact have possession, and notwithstanding that claimants denied the right of the bankruptcy court to exercise or assume jurisdiction and that they never, in fact, consented thereto.

TOPICAL SUMMARY OF THE ARGUMENT

I. Bankruptcy Act provides that consent of claimant is necessary to give jurisdiction to federal district courts where suit is not under Sections 60, 67 and 70.

II. Where bankruptcy court has possession of res, court may administer res without claimant's consent. Here possession is lacking.

III. Was suit one for recovery under Sections 60, 67 and 70?

IV. Could possession be imparted to a trustee by claimant's failure to deny a dubious allegation of possession.

(1) Trustee's allegation of possession was not an allegation of fact.

(2) The Rules of Civil Procedure are not applicable to summary proceedings.

(3) Where a court has no jurisdiction, failure to deny a pleading's allegation or the admission of it cannot give court jurisdiction.

V. Consent gives jurisdiction.

VI. But consent not here given.

VII. Is consent given by failure to deny possession in trustee?

VIII. Is consent given where jurisdiction objected to at outset of proceedings, notwithstanding objectors participation in hearing on merits?

IX. Is consent to jurisdiction assumed where objected to, though specific grounds for objection be not given?

X. Is consent to jurisdiction assumed where objection to jurisdiction is based on wrong reason?

XI. Conclusion.

ARGUMENT

I. Bankruptcy Act provides that consent of claimant is necessary to give jurisdiction to federal district courts where suit is not under Sections 60, 67 and 70.

Under Section 23(b)[2] (11 U.S.C.A. Sec. 46(b)), Sec. 60[3], Sec. 67[4], and Sec. 70[5] (11 U.S.C.A. Sec. 96, Sec. 107 and Sec. 110) the district courts of the United States are given jurisdiction of suits by a trustee in bankruptcy to set aside a preference (Sec. 60), to set aside a fraudulent transfer *made by the bankrupt* within one year of the filing of the petition (Sec. 67) or to set aside a transfer *made by the bankrupt* which is fraudulent as against any creditor (Sec. 70), unless by consent of the defendant.

The suit here involved was not of the enumerated character. It was a suit to declare the title held by the adverse claimants to the fee in certain property to be held in trust for the bankrupt.

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(2) Sec. 23(b) provides as follows: "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in Sections 60, 67 and 70 of this Act."

(3) Sec. 60(b) provides as follows: "For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

(4) Sec. 67(e) makes like provision as Sec. 60(b).

(5) Sec. 70(e)(3) provides: "For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

Therefore, absent consent, the Federal Court had no jurisdiction to entertain such suit.

II. Where bankruptcy court has possession of res, court may administer res without claimant's consent. Here possession is lacking.

Of course, if the Trustee held possession of the *res*, the bankruptcy court would inherently have had jurisdiction by virtue of its power to administer estates of bankrupts in its possession. But if possession were not in fact in the Trustee, could the Trustee be considered in possession because of a failure of the claimant to deny a dubious allegation of possession?

Thus, there are three questions presented:

First: Was the suit one for recovery under Sections 60, 67 or 70 of the Bankruptcy Act?

Second: The Trustee not being in possession, could possession be imparted to him by the failure of the adverse claimant to deny a dubious allegation of possession?

Third: Was consent given by the defendant (adverse claimants)?

III. Was suit one for recovery under Sections 60, 67 or 70?

The answer to this query can only be in the negative. It was a suit to compel a transfer or delivery of property which the Trustee claimed the adverse claimants

held in trust for the bankrupt, or at the most to declare the deed held by the adverse claimants to be in effect a mortgage. In neither event is the present proceedings a suit to recover a preference or to set aside a conveyance *made by the bankrupt.*[6]

Therefore, jurisdiction was not given to the federal courts to hear such suit, absent consent.

IV. Could possession be imparted to a trustee by claimant's failure to deny a dubious allegation of possession?

Possession of the fee was not in the possession of the Trustee. The purpose of the proceeding was to obtain from the adverse claimant the fee in the property. A reading of the opinion of the Circuit Court of Appeals will, we believe, disclose that the Court, in effect, came to the conclusion that the Trustee in bankruptcy was not in fact in possession of the *res.* The entire pleadings and evidence indicated that David Honeyman held the fee and the Trustee merely held the rights under the lease to collect the rentals from the Lessee during the period of the leasehold. Possession of the rights under the lease was not in question in this proceeding. Certainly upon expiration of the lease, the freehold remained in David Honeyman and in no one else. The tenant must attorn to the holder of the fee.

However the Circuit Court of Appeals held that since the adverse claimants failed to deny an allegation

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(6) Kaigler v. Gibson, 264 Fed. 240. Harris v. First National Bank, 216 U.S. 282; 30 Sup. Ct. 296, 54 L. Ed. 528. Hull v. Burr, 153 Fed. 945.

in the petition alleging possession of the building in the Trustee, possession must be assumed, by virtue of Rule 8(d) of the Rules of Civil Procedure, to have been in the Trustee. Said the court:

> "Here the crucial issue of the court's possession was tendered in the petition of the Trustee, and was not met by appellants. . . . In this condition of the pleadings we think the court's possession must be taken as admitted. General Order 37, 11 U.S. C.A. foll. Sec. 53; Rule 8(d) Rules of Civil Procedure; Remington on Bankruptcy, 4th Ed., Vol. 2, Sec. 664."

Let us, therefore, consider whether the court was not in error in determining that the failure of the adverse claimants to deny the allegation of the Trustee's petition concerning possession was tantamount to possession in fact. We maintain:

1. That the allegation was not an allegation of fact, but a mere conclusion which required no denial, and
2. That the Rules of Civil Procedure are not applicable to summary proceedings and, therefore, that Rule 8(d), making failure to deny equivalent to an admission, is not controlling here.

(1) Trustee's allegation of possession was not an allegation of fact.

The Trustee in his petition for an order to show cause against the adverse claimants asserted that the claimant, David Honeyman, held the legal title to the

Vaughn Street Property (R. 10); that David Honeyman had executed a lease of said property to the General Electric Company at a rental of $675 per month (R. 11); that David had assigned his rights to said lease and the rentals accruing thereunder to the Trustee (R. 11); and that in a suit instituted by the lessee in which the Trustee, David Honeyman and others were made defendants, a decree was entered directing the lessee to pay all rentals under the lease to the Trustee (R. 12) and relieving it from any liability to David Honeyman in making the payments (R. 13). The Trustee then followed up these allegations with the allegation:

> "That your petitioner has ever since said date (the date of the decree above mentioned) collected the rentals pursuant to said judgment, *and is now in possession of the General Electric building.*"(7) (Emphasis ours)

We insist that this allegation of possession is a conclusion from the previously detailed facts alleged, and that it required no answer. Thus no answer being requisite, failure to answer could not be construed as an admission.

> "A pleader is under no obligation to deny the legal conclusions set out in the pleading of his adversary; indeed it would be improper for him to do so. It cannot be presumed, therefore, that the truth of such allegations is admitted because not denied." 12 Enc. Plead. & Prac., p. 1025.

(7) The Vaughn Street property.

(2) The Rules of Civil Procedure are not applicable to summary proceedings.

The proceeding here attacked was a summary proceeding before the Referee. Summary proceedings, in their nature being informal and not subject to the ordinary processes of procedure and practice, are not governed by the strict rules of procedure and practice. It is difficult to fully appreciate how in one phase formal procedure can be invoked and in another it can be eliminated. For example, a defendant is denied in summary proceedings a right to trial by jury. Moreover, in such proceeding he is subject to punishment for contempt and to imprisonment for failure to obey an order, a process which is unknown as a result of plenary action.[8] Since formal requirements are not invoked and since substantial rights are frequently denied in summary proceedings, obviously the strict adherence to formal rules of pleading are not requisite in summary proceedings as they are in plenary suits. Says the court *In Re Bender Body Co.*, 47 F. Sup. p. 224, 231:[9]

> "By Rule 81, Rules of Civil Procedure, all District Court rules are declared inapplicable to bankruptcy proceedings except in so far as they may be applicable thereto as promulgated by the Supreme Court of the United States. While the Supreme Court in General Order 37, 11 U.S.C.A. following Section 53, does refer to such rules, their application is limited. As stated in Remington on Bankruptcy, Sec. 31, General Order 37 has been construed to refer only to suits and proceedings other than the proceedings

(8) Remington on Bankruptcy, 4th Ed., Vol. 5, Sec. 2409.
(9) Affirmed 139 F. (2d) 128.

in bankruptcy themselves; in other words, to suits and proceedings brought in the Federal Courts in aid of bankruptcy proceedings, as suits in equity or law to recover preferences or set aside fraudulent conveyance."

So even if the allegation of possession in Trustee's petition be taken to be an allegation of fact and not a mere conclusion, still the failure of the adverse claimants to deny that allegation cannot be taken as an admission by them of possession in the Trustee, when the entire pleading of both parties shows a lack of possession.

(3) Where a court has no jurisdiction, failure to deny a pleading's allegation or the admission of it cannot give court jurisdiction.

The pleading of the Trustee here sets up a cause of action beyond the jurisdiction of the federal courts. Therefore, the federal courts, having no jurisdiction in the absence of consent, could not be given jurisdiction by the failure of the adverse parties to plead to a particular allegation of the petition. It is elementary that jurisdiction of a federal court is determined by allegations of the petition, bill or complaint, and that where the facts alleged do not bear out such allegation the cause should be dismissed. (10)

(10) Mosher v. Phoenix, 287 U.S. 29, 77 L. Ed. 148, 53 Sup. Ct. 67.

V. Consent gives jurisdiction.

We readily adhere to the position that consent will give jurisdiction to a federal court to hear and determine a suit by a trustee against an adverse claimant. Let us, therefore, ascertain whether consent could be considered to be given here.

Said the Circuit Court of Appeals in its opinion:

". . . . no intelligible objection to the exercise of summary jurisdiction appears to have been voiced at any stage of the proceeding. Appellants call attention to the opening paragraph of their answer in which they stated that they were 'appearing specially and not waiving any of their rights with respect to the insufficiency of the petition for turn over,' and to a later averment to the effect that 'said proposed order if carried into execution would be the taking of property without due process of law and finally the court is without jurisdiction in the premises.' These statements, more especially when coupled with the absence of any denial of the court's possession are too vague and general to raise the point. If an adverse claimant is unwilling to submit to an adjudication of his claim in a summary way there is no good reason why he should not be required explicitly to inform the referee of his objection. Compare Cline v. Kaplan, supra; Hall v. Goggin, 9 Cir., 148 F. 2d 744; In re Realty Associates Sec. Corp., 2 Cir., 98 F. 2d 722. He will not be permitted to speculate on the outcome of the proceeding, and then, if he loses the decision, for the first time *understandably* protest the procedure.

"A study of the record persuades us that the point now urged is a mere afterthought. If it had been in the mind of counsel at the time of the hearing one would expect to find some reference to it in the peti-

tion for a review by the court. But there the only jurisdictional exception taken was grounded on the pendency of a suit by the trustee in an Oregon state court to obtain the same relief as that sought before the referee, it being thought, apparently, that the trustee had thereby committed himself and his cause irrevocably to the jurisdiction of the state court." (R. 520-521).

VI. But consent not here given.

Now let us analyze the situation and the correctness or error of the court's opinion in reference thereto. A suit was instituted, which the court had no jurisdiction to entertain. This was apparent from the allegations of the Trustee's petition as we have already demonstrated. So the adverse claimants answered specially and say:

". . . . appearing specially in this answer to show cause and not waiving any of their rights with respect to the insufficiency of the petition for turn over and restraining order, and respectfully represent . . . ." (R. 27).

Is that not an objection to the right of the court to hear the matter? Certainly no special appearance would have been proper if it went merely interposed to test the deficiency of the complaint to state an adequate cause of action. The special appearance was an objection to the petitioners' asserted right to a turn over or restraining order.

Be that as it may, the adverse claimants further answered and said:

". . . . said proposed order if carried into execution would be the taking of property without due process

of law and finally the Court is without jurisdiction in the premises." (R. 35).

Here, evidently, is a definite objection specifically raised first to the *summary* jurisdiction of the bankruptcy court, and then to both summary and plenary jurisdiction.

The hearing of the matter by the Referee in a summary manner was objectional to the adverse claimants since the order proposed to be issued, if carried into execution, would be the taking of the claimants' property without due process of law. The adverse claimants so said in very definite language, yet the Circuit Court of Appeals deemed such objection "unintelligible."

Secondly, the adverse claimants, as clearly as language could make it intelligible, objected to the matter being heard because "the Court is without jurisdiction in the premises." Does this language need interpretation? If so, we would say that it meant that the federal courts had no jurisdiction, plenarily or summarily, to hear a cause of this nature. Consent certainly cannot be premised under such circumstances.

VII. Is consent given by failure to deny possession in Trustee?

The Circuit Court of Appeals evidently gave some weight to the failure of the adverse claimants to deny the Trustee's allegation concerning possession as an element of consent. (R. 520). Perhaps if there had been no definite objection to the jurisdiction on the part of

the claimants, a failure to deny an allegation of possession may possibly have had in it some element of consent, but certainly in connection with the postive objections expressed, it could not be considered as implying consent. One does not consent to jurisdiction when they emphatically object to it, notwithstanding failure to attack a specific allegation of doubtful legal intendment.

VIII. Is consent given where jurisdiction objected to at outset of proceedings, notwithstanding objectors participation in hearing on merits?

Nor does one consent to jurisdiction who, after his objection to jurisdiction has been tendered, submits to and contests the proceedings on the merits.

The Circuit Court's determination of this matter (R. 521) is clearly contrary to this court's rulings in the case of *Louisville Trust Co. v. Comingor,* 184 U.S. 25, 26; 46 L. Ed. 416; 22 Sup. Ct. 293; and of *Cline v. Kaplan,* 323 U.S. 97; 89 L. Ed. 97, 100; 65 Sup. Ct. 155. The facts on the question of consent in this case and in those cases are substantialy parallel. There, as here, objection was made "at the outset" to the jurisdiction: There, as here, after the objection was made, the adverse claimants "participated in the proceedings before the referee." We quote from the more recent case (Cline v. Kaplan). Said this court:

> "Consent to proceed summarily may be formally expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit, like the right to a jury trial, may be waived by failure

to make timely objection. MacDonald v. Plymouth County Trust Co., supra (286 U.S. at 266, 267, 76 L. Ed. 1094, 1095, 52 S. Ct. 505, 20 Am. Bankr. Rep. (N.S.) 1). Consent is wanting where the claimant has throughout resisted the petition for a turnover order and where he has made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a final order. Louisville Trust Co. v. Comingor, supra. In the Comingor Case although the claimant 'participated in the proceedings before the referee, he had pleaded his claims at the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered.' Id., 184 U.S. at 26, 46 L. Ed. 416, 22 S. Ct. 293, 7 Am. Bankr. Rep. 421. This, it was held, negatived consent and thereby the right to proceed summarily.

"Thus, what a bankruptcy court may do and what it may not do when a petition for a turnover order is resisted by an adverse claimant is clear enough. But whether or not there was the necessary consent upon which its power to proceed may depend is, as is so often true in determining consent, a question depending on the facts of the particular case. And so we turn to the facts of this case.

"When the trustee filed his petition for a turnover order, respondents denied any basis for such an order and asserted that adverse claim. There is no dispute about that. Before the matter went to the referee for determination, respondents explicitly raised objection to the disposition of their claim by summary procedure. They later amplified that objection by a written motion and supported it by extended argument. The established practice based on the criteria of the Comingor Case was thus entirely satisfied. We reject the suggestion that respondents conferred consent by participating in the hearing on the merits. See Re West Produce Corp. (C.C.A. 2d) 118 F. (2d) 274, 277, 45 Am. Bankr. Rep. (N.S.) 243."

IX. Is consent to jurisdiction assumed where objected to, though specific grounds for objection be not given?

Section 23(b) of the Bankruptcy Act provides that suits, except as provided in Sections 60, 67 and 70, shall not be instituted in the federal courts "unless by consent of the defendant". In other words, consent, except in suits brought under these three sections, is necessary to give the court jurisdiction. The Bankruptcy Act does not say that a negation of consent to jurisdicition (that is to say an objection to jurisdiction) will be assumed to be consent unless the grounds on which the objection to jurisdiction be given or be specified. It does not say that unless a particular ground of, or reason for, objection to jurisdiction be not given, consent will be assumed.

We assert with confidence that if a claimant or defendant does not like the color of a judge's hair or the way he wears his robe, he can object to jurisdiction, or withhold his consent for those reasons, or any other, and the objection would be good. The Act requires *consent,* and while consent to jurisdiction may be inferred by action or inaction, it certainly cannot be inferred where it is negative by objection to jurisdicition. We are somewhat unable to understand in this connection the statement in the Opinion of the Court,

> "if an adverse claimant is unwilling to submit to an adjudication of his claim in a summary way, there is no good reason why he should not be required *explicitly* to inform the referee of his objections,"

citing among other the case of *In Re Realty Associates Security Corporation,* 98 F. (2d) 722. We assume from such statement that the Court meant that the claimant is required to explain to the referee the particular basis of his objection, in fact, to give a specification thereof. We assume this interpretation in view of the fact that the court cites *Realty Associates Security Corp.,* which case was called to its attention in the brief of Appellee as warranting the requirement that the objecting claimant must specify his grounds of objection to jurisdiction, otherwise it will be considered a consent. Apparently the Court assumed that this case made such a holding, notwithstanding the appellants analyzed in their reply Brief the holding of that case and showed clearly that such case made no such holding. We stated in our Brief and we again state,

> "In that case objections to the jurisdiction of the Court were specifically based on the lack of proper service of the Petition and of the Order to Show Cause. That is to say, it was based on the fact that the Court did not have jurisdiction over the parties. It appears from the Opinion that that defect was cured by proper service, thus giving to the Court jurisdiction over the parties. Thereafter, no opposition to the jurisdicition was made, and the parties proceeded to trial.
>
> "Obviously Judge Hand was correct in holding that the parties waived the objection to the jurisdiction of the court over the subject matter by objecting merely to the proper jurisdiction over the parties, and upon such defect being cured, proceeding to trial without further objection. Nowhere, however, does Judge Hand state that where objection is made to the jurisdiction of the Court over the subject

matter, that the specific reasons on which such objection is based must be assigned."

We insist, therefore, that objection to the jurisdiction of the court for whatever reason, however fantastic, or for no reason whatsoever, is sufficient to show a lack of consent. Here the objection was made for good and sufficient reasons, but as stated, the reason or the purpose of the objection is not the proper subject of inquiry by the Court.

X. Is consent to jurisdiction assumed where objection to jurisdiction is based on wrong reason?

We maintain further that even though the objection to jurisdicition be based on an entirely erroneous reason, that still the objection being made, consent to jurisdiction is lacking. Here one of the grounds for objection to the jurisdicition of the Court was stated to be that another suit was pending in a State Court for the same relief. Perhaps that was not a good ground for an objection, but it certainly was an objection to the jurisdiction and certainly not a consent. It may be that an adverse claimant might feel he would get a prejudice hearing before a certain court and, therefore, desired for that reason to object to jurisdicition. We maintain that if such a reason appeared, still the objection being made, it could not be considered a consent. So here, even though one of the bases for objection may have been an erroneous one, still it would not impart consent, even if the erroneous ground were the only ground, as here it was not.

XI. Conclusion.

We most respectfully insist that the Circuit Court of Appeals for the Ninth Circuit in this case has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision. We also assert that its decision is directly in conflict with the decisions of this Court in the cases of *Louisville Trust Co. v. Comingor,* ante, and *Cline v. Kaplan,* ante.

A Writ of Certiorari is therefore respectfully prayed for.

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W. G. KELLER,
SIDNEY TEISER,
Attorneys for Petitioners.

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In the Supreme Court

of the United States

No.....

OCTOBER TERM, 1946

NANNY WOOD HONEYMAN, Executrix of the Estate of DAVID T. HONEYMAN, Deceased, (substituted for DAVID T. HONEYMAN) and NAN WOOD HONEYMAN, *Petitioners,*

-vs-

MATT S. HUGHES, Trustee in Bankruptcy of Honeyman Hardware Company, a corporation, bankrupt, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' statement of "The Matters Involved" (Petitioners' Brief, Page 1) and "Statement Of The Case" (Petitioners' Brief, Page 8) are incomplete. A

complete statement follows:

Honeyman Hardware Company, a corporation, was adjudged a bankrupt on May 25, 1942 (R. 7).

On and prior to said date Petitioners' Testator, David T. Honeyman, hereinafter referred to as David, held the naked legal title to a parcel of real property described herein as "General Electric Building" pursuant to an agreement. This proceeding relates to said property and agreement.

Said agreement (same appears R. 18, and was offered and received as Ex. Q.Q., R. 365) was entered into on April 20, 1933 between three brothers, David, Thomas D. and James D. Honeyman. It recites that said real property, then standing in the name of David, shall be conveyed to Honeyman Hardware Company; that a deed conveying said property to Honeyman Hardware Company shall be held in escrow by David for the purpose of securing payment of two promissory notes executed by Thomas D. and James D. Honeyman, aggregating $25,000.00, and also for the purpose of securing payment of a note from David and his wife to Oregon Mutual Life Insurance Company; that Honeyman Hardware Company shall be entitled to collect and retain all rentals; that an existing lease on the premises to General Electric Company be assigned and transferred by David to Honeyman Hardware Company; that prior agreements between the parties relating to the property be cancelled and annulled.

This agreement was never vacated, modified or amended (R. 169). It remains the final agreement of

the parties (Referee's Memorandum Opinion, R. 37).[1]

The property was originally purchased with funds of bankrupt corporation (R. 165). It was deeded to David in 1928 for the purpose of procuring a loan in his name from Oregon Mutual Life Insurance Company (R. 167). David never owned any beneficial interest in the property (R. 167).

On December 1, 1942, David, as lessor, executed a five year renewal lease to the General Electric Company, as lessee of the property, to take effect May 31, 1943 (Ex. Q., offered and received R. 159, but not made part of printed record).

On June 4, 1943, said renewal lease, including the rental thereby secured, was assigned by David to the Respondent (R. 159). This assignment was made in compliance with a summary order of the Bankruptcy Court directing David to assign the lease, from which order no review or appeal was taken (R. 159, 241).

On September 28, 1943, in a suit in the District Court of the United States, for the District of Oregon, wherein General Electric Company was plaintiff, and

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[1]Statements appear in Petitioners' Brief, at pages 2 and 9, that a subsequent agreement was entered into whereby David owned the property absolutely. Petitioners' Ex. E.E. for identification in support thereof was rejected by the Referee because it was not a signed agreement of the parties changing the terms of the agreement of April 20, 1933 (Ex. Q.Q.); it was only a memorandum containing suggestions (R. 244). Moreover it was not in compliance with the Statute of Frauds, O.C.L.A., Section 2-909 (6), which provides that unless in writing and subscribed, "an agreement * * * * for the sale of real property, or of any interest therein;" is void. This statute covers the sale of an equitable interest as well as the sale of the legal title: *Chenoweth & Johnson et al v. Lewis,* 9 Ore. 150.

Petitioners make no assignment of error on the rejection of said memorandum or upon the failure of the Referee to find that any subsequent agreement existed. For these reasons the statements in Petitioners' Brief relating to a subsequent agreement are improper, immaterial and are not entitled to any consideration in the determination of this matter.

David, Oregon Mutual Life Insurance Company and Respondent herein were defendants, a Judgment was entered ordering the General Electric Company to pay to Respondent all rentals due under the renewal lease of December 1, 1942 (R. 159, 160). Ever since the entry of said Judgment, Respondent has collected the rentals from the lessee (R. 161).

On February 17, 1944, Respondent commenced this proceeding by filing his petition in the Bankruptcy Court alleging that the indebtedness, aggregating $25,000.00, formerly owed to David under the provisions of the agreement of April 20, 1933, (Ex. Q.Q.) had been paid. Respondent offered to pay the balance due Oregon Mutual Life Insurance Company. Respondent prayed for an order requiring David and his wife to deliver to him the deed held in escrow by David to secure the payment of said indebtedness.

The Petition alleged:

"6. That your Petitioner * * * * is now in possession of the General Electric Building." (R. 13)

Petitioners filed an Answer thereto, denying certain averments of the Petition, *but they did not deny the foregoing averment that Respondent was in possession* (R. 27). Petitioners made numerous affirmative allegations. They did not allege that they were in possession of the property. Nor did they, at any stage of the proceedings, until their appeal to the Circuit Court of Appeals, object to the summary proceedings upon that ground, or that they were adverse claimants, or that the Bankruptcy Court did not have possession of the property.

Hearing was had upon the merits. The Referee entered findings (R. 41) wherein he found, among other things, that (1) Respondent was in possession of the property, subject only to the possession of General Electric Company, as lessee (R. 45); (2) the indebtedness of $25,000.00 had been paid to David in full by bankrupt (R. 54); (3) bankrupt was the beneficial owner of the property (R. 55), and (4) David held legal title as security only for said indebtedness (R. 55).[2]

Pursuant thereto the Referee entered an order requiring Petitioners to turn over and deliver to Respondent the original deed signed and executed by Petitioners and held by them in escrow (R. 57).

Petitioners filed a Petition For Review by the District Court of the Referee's Order (R. 62). In their Petition they admitted that the property was in possession of Respondent (R. 80).

The District Court affirmed the Referee's Order (R. 99). The Circuit Court of Appeals, 9th Circuit, affirmed the District Court (156 F. (2d) 27, and R. 518).

Petitioners' application for Writ of Certiorari is predicated upon the contention that the Bankruptcy Court did not have summary jurisdiction. The Circuit Court of Appeals upheld the Bankruptcy Court's jurisdiction

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[2]In Oregon, a deed absolute on its face but held as security for an indebtedness is construed as a mortgage: *Conley v. Henderson*, 158 Ore. 309, 75 P. (2d) 746; *Harper v. Interstate Brewery Company*, 168 Ore. 26, 120 P. (2d) 757.

In Oregon a mortgage does not vest legal or equitable title in a mortgagee. It gives him a lien only: *Investers Syndicate et al v. Smith et al*, 105 F. (2d) 611 (C.C.A. 9) construing 8-211, *Oregon Compiled Laws Anno.*

In Oregon a mortgagee has no right to possession unless such right is provided for in the mortgage: *Investors Syndicate et al v. Smith et al, supra; State, ex rel, Nayberger v. McDonald*, 128 Ore. 684, 274 Pac. 1104.

upon the following grounds:

(1) The Bankruptcy Court's possession of the property was admitted by the pleadings.

(2) Petitioners consented to summary jurisdiction by failing to object to the exercise thereof.

The record is nil of any objection to the Referee, protesting summary jurisdiction. Petitioners contend that certain language in their Answer to Respondent's Petition for a turnover contained these objections. The questions presented to this Court are, therefore, as follows:

(1) May the Referee's findings, that Respondent was in possession, now be disturbed?

(2) Was the Bankruptcy Court's possession admitted by the pleadings?

(3) Did Petitioners object to summary jurisdiction?

SUMMARY OF RESPONDENT'S ARGUMENT

I. TO POINTS I, II AND III, PETITIONERS' ARGUMENT (Petitioners' Brief, Pages 15 and 16).

A. Possession Confers Summary Jurisdiction.

B. Referee's Findings That Respondent Was In Possession Is Conclusive In This Case.

II. TO POINT IV, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 17).

Possession Of Property In Bankruptcy Court Confers Jurisdiction To Summarily Determine Title Thereto And To Order Conveyance.

II (1). TO POINT IV (1), PETITIONERS' ARGUMENT (Petitioners' Brief, Page 18).

Respondent's Allegation Of Possession In His Petition For Turnover Was A Material Averment Of Ultimate Fact.

II (2). TO POINT IV (2), PETITIONERS' ARGUMENT (Petitioners' Brief, Page 20).

Federal Rules Of Civil Procedure Are Applicable To Summary Proceedings in Bankruptcy.

II (3). TO POINT IV (3), PETITIONERS' ARGUMENT (Petitioners' Brief, Page 21).

III. TO POINT V, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 22).

A. Submission Of Cause On Merits Without Protest To Jurisdiction Constitutes Consent.

B. Trial By Summary Proceedings Constitutes Due Process Of Law And Right To Trial By Plenary Suit Is A Procedural Right Which May Be Waived.

IV. TO POINT VI, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 23).

Petitioners' Answer Contains No Protest To Summary Jurisdiction.

V. TO POINT VII, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 24).

VI. TO POINT VIII, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 25).

VII. TO POINT IX, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 27).

Where Requisite Jurisdictional Averment Of Possession Is Alleged In Petition For Turnover And Is Not Denied, Objection To Jurisdiction Must Assert The Ground Of Objection To Summary Jurisdiction.

VIII. TO POINT X, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 29).

If Jurisdictional Objection Is Based Upon Wrong Reason, Objection Is Ineffectual.

IX. TO POINT XI, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 30).

ARGUMENT

I. To Points I, II and III, Petitioners' Argument (Petitioners' Brief, Pages 15 and 16).

Petitioners urge that since this proceeding was not instituted under Section 60, 67 or 70 of the Bankruptcy Act, the Bankruptcy Court had no summary jurisdiction unless Petitioners consented thereto. They do concede that if Respondent had possession of the property the Bankruptcy Court had summary jurisdiction.

Respondent *did* have possession (which was also admitted) and jurisdiction was thereby had irrespective as to whether Petitioners consented or not.

A. Possession Confers Summary Jurisdiction.

A bankruptcy court has the power to adjudicate summarily, rights and claims to property which is in the actual or constructive possession of the Court.[3]

This power is not based upon any statute. It arises out of possession.[4]

B. Referee's Findings That Respondent Was In Possession Is Conclusive In This Case.

As was pointed out in Respondent's Statement Of The Case, evidence was received (R. 161) and the Referee found that Respondent was in possession of the General Electric Building (R. 45).

Moreover Petitioners make no assignment of error with respect to these findings. Consequently such findings must be accepted by this Court.[5]

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[3] *Cline v. Kaplan*, 89 Law. Ed. 97, 323 U.S. 97, 65 S. Ct. 155;
Louisville Trust Co. v. Comingor, 46 Law. Ed. 413, 184 U.S. 18, 22 S. Ct. 293;
Bank of California v. McBride, 132 F. (2d) 769 (C.C.A. 9).

[4] *Murphy v. John Hofman Co.*, 29 S. Ct. 154, 211 U.S. 562, 53 Law. Ed. 327.

[5] Bankruptcy General Order XLVII; *In Re Eastern Oil Co.*, 100 F. (2d) 341 (C.C.A. 9);
Hill v. Douglass, 78 F. (2d) 851 (C.C.A. 9);
Remington on Bankruptcy, Fifth Edition, Volume 8, Section 3795, p. 119;
Ott v. Thurston, et al., 76 F. (2d) 368 (C.C.A. 9) at page 370: "The questions of fact having been passed upon by the referee and the District Court, they cannot be disturbed here upon appeal unless the findings are clearly and unmistakably erroneous."

II. To Point IV, Petitioners' Argument (Petitioners' Brief, Page 17).

Possession Of Property In Bankruptcy Court Confers Jurisdiction To Summarily Determine Title Thereto And To Order Conveyance.

Respondent having established that he was in possession the Bankruptcy Court had exclusive summary jurisdiction to determine the question of title[6] and to compel a conveyance from David.[7]

II (1). To Point IV (1), Petitioners' Argument (Petitioners' Brief, Page 18).

Respondent's Allegation Of Possession In His Petition For Turn Over Was A Material Averment Of Ultimate Fact.

Petitioners argue (without citation of authority) that Respondent's allegation that he was in possession is a conclusion of law. This contention is without merit. Respondent's allegation of possession was a direct and material averment of an ultimate fact.[8]

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[6] *Ex Parte Baldwin*, 78 Law. Ed. 1020, 291 U.S. 610, 54 S. Ct. 551; 78 Law. Ed. at page 1023: "But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title was not limited to the prevention of interference with the use of the land. (citing cases) The jurisdiction extends also to the adjudication of questions respecting the title. (citing cases)."

[7] *City of Long Beach, et al. v. Metcalf*, 103 F. (2d) 483 (C.C.A. 9); *In re Robinson*, 36 F. Supp. 11 (D. C., Mass.); *Bank of California v. McBride*, 132 F. (2d) 769 (C.C.A. 9); *White v. Barnard*, 29 F. (2d) 510 (C.C.A. 1); *United States National Bank v. Pamp*, 77 F. (2d) 9 (C.C.A. 8); *In re Logan*, 196 Fed. 678 (D.C., New York); *In re Oswegatchie Chemical Products Corporation*, 279 Fed. 547 (C.C.A. 2).

[8] *Parley's Park Silver Mining Company v. Kerr*, 9 S. Ct. 511, 130 U.S. 256, 32 Law. Ed. 906 at 908: "The complaint in the present case, in compliance with the requirements of the Practice Act of Utah Territory, states in concise language *the two ultimate facts*, upon which the claim for relief depends, *that the plaintiff is in possession of the property*, and that the defendant claims an interest or an estate therein adverse to him. These are sufficient to require the nature and character of the adverse claim on the part of the defendant to be set up, inquired into, and judicially determined, and the question of title finally settled." (Emphasis supplied.)

II (2). To Point IV (2), Petitioners' Argument (Petitioners' Brief, Page 20).

FEDERAL RULES OF CIVIL PROCEDURE ARE APPLICABLE TO SUMMARY PROCEEDINGS IN BANKRUPTCY.

Petitioners maintain under this point first, that the Federal Rules of Civil Procedure are not applicable to these proceedings, and, second, that the Circuit Court of Appeals erred when it held that Petitioners' failure to deny Respondent's allegation of possession constituted an admission thereof by virtue of Rule 8(d).

This position as a proposition of law is untenable and is not supported by authority.

General Order 37 of General Orders in Bankruptcy prescribes that the Rules of Civil Procedure shall be followed in bankruptcy proceedings.[9]

That the Rules of Civil Procedure apply to summary proceedings in bankruptcy was recognized in *Zydney v. New York Credit Men's Ass'n*, 113 F. (2d) 986 (C.C.A. 2). A creditor instituted summary proceedings against the bankruptcy trustee to recover property pledged to the petitioner to secure an indebtedness. The trustee filed no answer to the petition but an answering affidavit in argumentative form. The Court censured the failure of the referee to follow the Rules of Civil Procedure and held that since the trustee's answering affidavit was not

[9] G. O. XXXVII: "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be."

an answer as required by the Rules of Civil Procedure the allegations of the petition were admitted. The Court said (Page 987):

> "The failure to follow the proper practice has caused us a good deal of trouble in understanding the case, and in dealing with the record. General Order XXXVII, 11 U.S.C.A. following section 53, provides that the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, shall be 'followed as nearly as may be' in bankruptcy proceedings, though 'the court may * * * * modify the rules for the preparation or hearing of any particular proceeding'. A referee acts as the court of bankruptcy in a reclamation proceeding, § 1 (9), and so far as we can see, there was no occasion to 'modify' the Rules. It was of course entirely proper for the trustee to examine Zydney and the Bankrupt's officers in order to prepare his answer; but the answer, when prepared, should have been really an answer; i.e., it should have conformed to Rule 8(b), Rules of Civil Procedure. *The Trustee's 'answering affidavit' was not an answer at all; and the petition really stood admitted. Rule* 8 (*d*)." (Emphasis supplied).

At page 988 the Court said:

> "The Rules required the trustee to file an answer under Rule 8(b), and then that the cause should be noticed for hearing, like an action. This is by far the simplest and speediest way in the end; *and the only way now authorized by law.*" (Emphasis supplied).

In *Moonblatt v. Kosmin,* 139 F. (2d) 412 (C.C.A. 3) the bankruptcy trustee filed a petition with the referee for a turnover order against bankrupt's wife. She filed an answer to said petition which contained no objection to jurisdiction. A question presented upon appeal was the applicability of the Rules of Civil Pro-

cedure to summary proceedings. In holding that the Rules were applicable, the Court said at page 414:

> "The Federal Rules of Civil Procedure apply to bankruptcy cases by virtue of General Order No. 37, 11 U.S.C.A. following section 53. General Order No. 37 was in effect on February 13, 1939. It provides that in proceedings under the Bankruptcy Act the Rules of Civil Procedure for the District Courts of the United States shall be followed insofar as their provisions are not inconsistent with those of the Bankruptcy Act or of the General Orders."

It is thus definitely established that the Federal Rules of Civil Procedure are applicable to summary proceedings in bankruptcy.

In support of their position upon this point Petitioners rely upon *In re Bender Body Co.*, 47 F. Supp. 224. A consideration of the District Court's opinion discloses that the Court relied upon an inapplicable and therefore erroneous authority to support its decision.

The authority relied upon by the Court was *Remington On Bankruptcy, Section* 31, to the effect that General Order 37 refers only to suits and proceedings other than those in the Bankruptcy Court. Said Section 31 as edited by Remington is entitled "Federal Equity Rules" and relates to the old General Order in Bankruptcy number 37, which became inoperative on January 16, 1939. The text is not a consideration of the present General Order 37 nor does it purport to be.

Upon appeal (139 F. (2d) 128, C.C.A. 6) the Court held that the present General Order 37 makes the Federal Rules of Civil Procedure applicable to bankruptcy proceedings. The case was affirmed on other grounds.

II (3). To Point IV (3), Petitioners' Argument (Petitioners' Brief, Page 21).

Petitioners contend that Respondent's petition failed to allege facts sufficient to support summary jurisdiction and that, therefore, Petitioners' failure to deny any particular allegation of the Petition could not confer jurisdiction.

The answer to this contention is that Respondent's Petition alleged that he was in possession. This allegation not denied was an admission of said possession thereby vesting jurisdiction of the proceeding in the Bankruptcy Court.

III. To Point V, Petitioners' Argument (Petitioners' Brief, Page 22).

Petitioners concede that consent confers summary jurisdiction. They later assert, however, that they objected to summary jurisdiction and that they did not give their consent.

Respondent at this point desires to present the following established general principles pertaining to the doctrine of consent.

A. Submission Of Cause On Merits Without Protest To Jurisdiction Constitutes Consent.

It has been uniformly held that a submission of a cause on its merits without protest to the exercise of summary jurisdiction constitutes consent to summary

jurisdiction and a waiver of all objections thereto.[10]

B. Trial By Summary Proceedings Constitutes Due Process Of Law And Right To Trial By Plenary Suit Is A Procedural Right Which May Be Waived.

Summary procedure is not a denial of due process of law.[11]

The right of an adverse claimant to trial by plenary suit is a procedural right, a privilege only, which he may waive by failure to raise an appropriate objection in due time.[12]

IV. To Point VI, Petitioners' Argument (Petitioners' Brief, Page 23).

Petitioners' Answer Contains No Protest To Summary Jurisdiction.

In support of Petitioners' argument that they protested to summary jurisdiction, they rely solely upon

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10 *First State Bank v. Fox.* 10 F. (2d) 116 (C.C.A. 8);
Bachman v. McCluer, 63 F. (2d) 580 (C.C.A. 8);
In re Murray, 92 F. (2d) 612 (C.C.A. 7);
In re Realty Associates Securities Corporation, 98 F. (2d) 722, (C.C.A. 2);
In re Pinsky-Lapin & Co., 98 F. (2d) 776 (C.C.A. 2);
Bagley v. Rowley, 127 F. (2d) 139 (C.C.A. 6);
In re West Produce Corporation, 118 F. (2d) 274 (C.C.A. 2);
Moonblatt v. Kosmin, 139 F. (2d) 412 (C.C.A. 3).

11 *Shor v. McGregor,* 108 F. (2d) 421 (C.C.A. 5);
U. S. National Bank v. Pamp, 83 F. (2d) 493 (C.C.A. 8).

12 *In the matter of Tax Service Association of Illinois,* 305 U.S. 160, 59 S. Ct. 131, 83 Law. Ed. 100 at page 103: "Since the parties had only a procedural right to have these issues tried in a plenary suit, they were at liberty to waive this right."
McDonald v. Plymouth County Trust Company, 286 U.S. 263, 52 S. Ct. 505, 76 Law. Ed. 1093 at page 1095: "But it does not follow that this privilege, extended for the benefit of a suitor, may not, like the right to trial by jury, be waived, * * * *."

some language in their Answer to the Respondent's Petition for a turnover order. Indeed, they may not rely upon any other word, act or writing said or done, because the record is void of any assertion to the Referee at any stage of the proceedings that Petitioners were objecting to summary jurisdiction.

Petitioners assert their objection was contained in the following statement of their Answer: "* * * appearing specially in this answer to show cause, and not waiving any of their rights with respect to the insufficiency of the Petition for turnover and restraining order, and respectfully represent * * *" (R. 27).

Notwithstanding Petitioners' statement the Answer was not a special appearance because the allegations went to the merits of the cause.[13] The remaining portion of the quoted paragraph purports merely to be a reservation of rights with respect to the insufficiency of the Petition itself. The Petition was sufficient insofar as it alleged facts vesting jurisdiction in the Bankruptcy Court because it alleged that the Bankruptcy Court was in possession of the property.

Nothing is contained in the foregoing language as indicating or suggesting that Petitioners were objecting to the exercise of summary jurisdiction by the Court.

The only other language in Petitioners' Answer which they claim to be a protest is as follows: "* * * said proposed order if carried into execution would be the

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[13] *Davis v. Davis*, 305 U.S. 32, 59 S. Ct. 3, 83 Law. Ed. 26 at Page 30: "The assertion in her plea that it was special and made for the sole purpose of challenging jurisdiction is of no consequence, if in fact it was not so limited. (citing cases)."

taking of property without due process of law and finally the Court is without jurisdiction in the premises." (R. 35).

Respondent has already shown that determination of rights by summary proceedings in bankruptcy is not a denial of due process.[14]

The allegation, "* * * the Court is without jurisdiction in the premises", unsupported by any allegation of fact showing wherein there is lack of jurisdiction is a conclusion of law and insufficient as a protest.[15]

The final expression of this Court on the law of consent is contained in *Cline v. Kaplan,* 323 U.S. 97, 65 S. Ct. 155, 89 Law. Ed. 97, wherein the Court said at page 100:

> "But whether or not there was the necessary consent upon which its power to proceed may depend is, as is so often true in determining consent, a question depending on the facts of the particular case. And so we turn to the facts of this case."

Petitioners consented to summary jurisdiction as established by the following:

1. Respondent alleged in his Petition for turnover that he was in possession.

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[14] *Shor v. McGregor,* 108 F. (2d) 421 (C.C.A. 5); *U. S. National Bank v. Pamp,* 83 F. (2d) 493 (C.C.A. 8).

[15] *Ritchie v. McMullen,* 159 U.S. 235, 16 S. Ct. 171, 40 Law. Ed. 133 at page 135: "The general averments, in the first part of the answer, that the judgment was 'an irregular and void judgment,' and, in the second part, that 'said judgment was irregular,' and 'without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action,' are but averments of legal conclusions, and wholly insufficient to impeach the judgment without specifying the grounds upon which it is supposed to be irregular and void, or without jurisdiction or authority to enter it. Cowan v. Braidwood, 1 Man. & G. 882, 2 Scott, N.R. 138."

2. Petitioners did not deny this allegation and it was thus admitted.

3. Petitioners did not allege in their Answer either that they were in possession of the property or that Respondent was not in possession.

4. Petitioners never in any way brought to the Referee's attention that they had objection to summary jurisdiction, and did in fact voluntarily and willingly submit the cause on its merits.

5. Petitioners in their Petition for Review to the District Court admitted that the Respondent was in possession (R. 80, par. "(3)").

If Petitioners' position is sustained they will have had a fair and complete hearing upon the merits without objection, an opportunity to gamble for a successful result upon that hearing, and when they lost, a further opportunity to another hearing upon the merits. As was stated in the opinion of the Circuit Court, "He will not be permitted to speculate on the outcome of the proceedings, and then, if he loses the decision, for the first time understandably protest the procedure." (R. 521).

V. To Point VII, Petitioners' Argument (Petitioners' Brief, Page 24).

Petitioners argue that the lower Court should not have treated their failure to deny Respondent's possession as constituting an element of consent.

Consent is a question depending upon the facts of a

particular case.[16] Petitioners' failure to deny possession was a fact and circumstance which the Court was entitled to take into consideration.

VI. To Point VIII, Petitioners' Argument (Petitioners' Brief, Page 25).

Petitioners rely in support of their Petition for Writ of Certiorari upon *Louisville Trust Co. v. Comingor,* 184 U.S. 18, 22 S. Ct. 293, 46 Law. Ed. 413, and *Cline v. Kaplan,* 323 U.S. 97, 65 S. Ct. 155, 89 Law. Ed. 97. They contend that based upon these authorities submission of the cause upon the merits did not constitute their consent to jurisdiction because of the alleged objections to jurisdiction contained in Petitioners' Answer.

These cases are clearly distinguishable. In each the objection to summary jurisdiction was appropriately raised and brought to the Court's attention in such a manner that the Referee was specifically informed that the adverse claimant objected to the hearing.

In *Louisville Trust Co. v. Comingor,* supra, the Court stated the objection to jurisdiction was asserted as follows:

> "Comingor tendered an amended response before the Referee, setting forth that as was shown by the pleadings, records, and evidence in the case, and the entire proceedings had, neither that court nor the referee in bankruptcy had any jurisdiction, either of the respondent or the matter involved, to make any such orders or require respondent to answer thereto, * * * and that neither that court nor the referee in bankruptcy could proceed against

[16] *Cline v. Kaplan,* 89 Law. Ed. 97, 323 U.S. 97, 65 S. Ct. 155.

respondent as attempted by order or rule to pay over or by summary process."

In *Cline v. Kaplan, supra,* examination of the opinion of the Circuit Court of Appeals (142 F. (2d) 301) discloses that an oral motion was made before the Referee to dismiss on the ground that because appellants were adverse claimants the Court was without summary jurisdicition. Briefs were submitted on the jurisdictional question before decision by the Referee.

VII. To Point IX, Petitioners' Argument (Petitioners' Brief, Page 27).

WHERE REQUISITE JURISDICTIONAL AVERMENT OF POSSESSION IS ALLEGED IN PETITION FOR TURNOVER AND IS NOT DENIED, OBJECTION TO JURISDICTION MUST ASSERT THE GROUND OF OBJECTION TO SUMMARY JURISDICTION.

Petitioners argue that only their consent could give jurisdiction and that they had the right to withhold their consent for any reason, assigned or unassigned, and that the general language contained in their Answer to the Turnover Petition was a sufficient objection establishing their non consent.

But, as Respondent has already shown, possession of the property in the Bankruptcy Court gives it exclusive summary jurisdiction irrespective of consent and despite objection to jurisdiction. Respondent alleged his possession. Procedurally this was admitted. The requisite jurisdictional fact having been admitted objection to

jurisdiction could not be raised. Had there been no admission of possession even then explicitness is required of the ground upon which objection is made.[17] Else upon what basis may the Referee conclude that he may not have summary jurisdiction when the very fact establishing summary jurisdicition is alleged and uncontroverted?

VIII. To Point X, Petitioners' Argument (Petitioners' Brief, Page 29).

If Jurisdictional Objection Is Based Upon Wrong Reason, Objection Is Ineffectual.

Respondents contend that their alleged ground of objection was that another suit was pending in the State Court for the same relief (this was not asserted as an objection to jurisdiction) and that such alleged objection, although on untenable ground, was effectual to show lack of consent.

The fact is, however, that no ground of objection was asserted before the Referee's final order.[18]

Petitioners in their Petition for Review to the District Court asserted denial of due process and lack of jurisdiction upon the ground only (then advanced for the first time) that a suit was pending in the State Court for the same relief (R. 76). Had objection upon this ground been asserted in due time it would neverthe-

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17 *In re Realty Associates Securities Corporation*, 98 F. (2d) 722 (C.C.A. 2).

18 Objection to jurisdiction must be interposed before the entry of the Referee's final order: *Cline v. Kaplan*, 323 U.S. 97, 65 S. Ct. 155, 89 Law. Ed. 97; *Hall v. Goggin, et al*, 148 F. (2d) 774 (C.C.A. 9).

less have been ineffectual because it was not predicated upon the proper ground.[19]

IX. To Point XI, Petitioners' Argument (Petitioners' Brief, Page 30).

Petitioners conclude by asserting that the decision of the Circuit Court is in direct conflict with *Louisville Trust Co. v. Comingor*, supra, and *Cline v. Kaplan*, supra.

Respondent has distinguished these decisions. The objection to jurisdiction in each of those cases was explicit and intelligible. The Referee was fully apprised that the adverse claimant in each of said cases objected to summary jurisdiction and the specific grounds upon which the objection was made.

In the case at bar there was no objection to the exercise of summary jurisdiction.

IT IS RESPECTFULLY SUBMITTED that Petition for Writ of Certiorari be denied.

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[19] *In re Realty Associates Securities Corporation*, 98 F. (2d) 722 (C.C.A. 2), at 725: "Appellants' contention that a summary proceeding could not properly be brought to reach the rentals is plainly without substance. In the first place the objection to the proceeding was based upon lack of proper service of the petition and order to show cause. That defect was cured. *If there ever was any right to attack the jurisdiction of the court to entertain a summary proceeding because of the nature of the issues involved, it was waived by failure to object on that ground and by proceeding to a trial on the merits.*" (Emphasis supplied).